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The Supreme Court and the Privilege Against Self-Incrimination: Has the Burger Court Retreated?

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Introduction

In 1953, Earl Warren was named by President Dwight Eisenhower to become Chief Justice of the United States Supreme Court. He served in this capacity until his retirement in 1969. Immediately thereafter, President Richard Nixon selected Judge Warren Burger to become the new Chief Justice. Earl Warren served as Chief Justice for sixteen years. As of the writing of this article, Chief Justice Burger has also been in his position for sixteen years. This article will discuss Supreme Court rulings during this 32-year period, focusing on the area of statements and confessions in criminal cases. The seminal decisions of the 1960s will be analyzed and consideration will be given to decisions by the Burger Court in the 1970s and 1980s. The key question will be whether the rulings of the '60s have been followed, ignored, limited, or distinguished in subsequent decisions.

The Beginnings

When Earl Warren was named to replace Fred Vincent as Chief Justice, he inherited a Court that had been badly split for several years on numerous questions. With the coming of Warren and other new Justices, however, the membership of the Court expressed a willingness to consider and to decide issues that had been avoided in earlier times. During Earl Warren's tenure as Chief Justice, he presided over a Court made up of a large and diverse group of individuals: Hugo Black (appointed in 1937, formerly a senator from Alabama), William Brennan (1956, Second Circuit judge), Harold Burton (1945, a senator from Ohio), Tom Clark (1949, Attorney General), William O. Douglas (1939, Securities Exchange Commission), Abe Fortas (1965, senior partner of a major Washington, D.C. law firm), Felix Frankfurter (1939, Harvard professor of law), Arthur Goldberg (1962, Secretary of Labor), John Harlan (1955, Second Circuit judge), Robert Jackson (1941, Solicitor General), Thurgood Marshall (1967, NAACP and Second Circuit judge), Sherman Minton (1949, a senator from Indiana), Stanley Reed (1938, Solicitor General), Potter Stewart (1958, Sixth Circuit judge), Bryon White (1962, deputy Attorney

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General), Charles Whittaker (1957, Eighth Circuit judge). Remarkably, this diverse group of individuals agreed to resolve issues that had divided the bar and judiciary for most of the century. The 1960s showed a dramatic upsurge in decisions in a host of constitutional law areas: civil rights,[1] first amendment protections,[2] legislative representation,[3] and others.[4]

While the upsurge in other areas of constitutional law may well have been dramatic, it was nothing short of revolutionary in the area of constitutional criminal considerations. Within a five-year period between 1962 and 1967 the Court decided *Gideon v. Wainwright*,[5] establishing the right to counsel at trial in serious criminal cases; *Griffin v. California*,[6] prohibiting the comment on the defendant's failure to testify at trial; *United States v. Wade*,[7] requiring a lawyer at post-indictment lineups; and *Mapp v. Ohio*,[8] creating an exclusionary rule in state cases to vindicate violations of the fourth amendment search and seizure provision. In no area, however, was the revolution as powerful as in the area dealing with statements and confessions of criminal defendants. Here the Court chose not simply to alter the traditional rules but to set forth very specific procedures to be followed by law enforcement officials. The Court chose, in Justice Harlan's words, to enact a "new constitutional code of rules for confessions."[9]

The Court reached this new code, however, only after struggling with the tension between effective law enforcement and individual rights for most of the twentieth century. Before the involvement of the Warren Court, the sole test for determining the appropriate nature of the police conduct and the admissibility of an individual's confession was a test of voluntariness.

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. . . .The line of distinction is that at which governing self-direction

1. *See, e.g.*, Douglas v. California, 372 U.S. 353 (1963), where the Court applied the equal protection clause to criminal appeals.

2. *E.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (protected speech); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (defamation).

3. Reynolds v. Sims, 377 U.S. 533 (1964) and Baker v. Carr, 369 U.S. 186 (1962), both dealing with "one man-one vote."

4. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (travel, welfare rights); Levy v. Louisiana, 391 U.S. 68 (1968) (rights regarding illegitimacy).

5. 372 U.S. 335 (1963).

6. 380 U.S. 609 (1965).

7. 388 U.S. 218 (1967).

8. 367 U.S. 643 (1961).

9. Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

> is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.[10]

This voluntariness test was, by necessity, a case-by-case approach. In each case the courts would have to look to the actions of the police officer, the individual characteristics of the defendant, as well as other surrounding circumstances, in determining whether the statement was a product of free will or one of coercion. The United States Supreme Court found it difficult to enunciate principles that lent themselves to clear precedential assistance. However, in some cases the answers were so clear that little debate ensued, even in the United States Supreme Court. For example, in *Brown v. Mississippi*,[11] the defendants refused to confess to a crime and were hanged by a rope to the limb of a tree, whipped, beaten with a leather strap with buckles on it, and were made "to understand that the whipping would be continued unless and until they confessed."[12] Even as late as 1967 similar cases reached the Supreme Court, as in *Beecher v. Alabama*.[13] There the defendant was captured after his escape from a road gang in the Alabama State Prison. The police chief, in questioning the defendant, pressed a loaded gun to his face while another officer pointed a rifle against the side of his head. After the defendant refused to confess, the police chief advised him that if he did not tell the truth he would be killed at that moment. The subsequent confession was ruled inadmissible.[14]

Cases such as *Brown* and *Beecher* were not difficult for the courts, as the police officers' conduct in both cases was clearly overreaching and would have bent the will of even the strongest of defendants. In other cases, however, the result was far more questionable. The defendant in *Crooker v. California* was repeatedly denied the assistance of counsel.[15] Despite such denial, his confession was ruled to be admissible, in part because he was a law student who appeared to understand his rights. In *Haynes v. Washington*,[16] however, the defendant's confession was not admitted after he too asked to talk with his lawyer and was told he could not unless he "cooperated" with the police. The dissenters in the *Haynes* case, decided just five years after *Crooker*, simply could not understand how the two cases could be distinguished and why the confession in *Haynes* was viewed to be involuntary and hence inadmissible.

The Warren Court Moves Toward Miranda

It became evident by the late 1950s that the case-by-case approach was an unsatisfactory way of dealing with the problem of allegedly involuntary con-

10. Culombe v. Connecticut, 367 U.S. 568, 602 (1961).
11. 297 U.S. 278 (1936).
12. *Id.* at 282.
13. 389 U.S. 35 (1967).
14. "A realistic appraisal of the circumstances of *this* case compels the conclusion that this petitioner's confessions were the product of gross coercion." *Id.* at 38.
15. 357 U.S. 433 (1958).
16. 373 U.S. 503 (1963).

fessions. The Supreme Court could not hear enough cases, and those cases it did hear tended to be resolved on the particular facts involved in the controversy. The state and lower federal courts were thus left in a quandary as to the precedential value of particular cases. With the change in personnel on the Court in the early 1960s, however, it was hoped that more guidance would be given to judges in this troubling area. The early hope was that the fifth amendment privilege against self-incrimination would be the guiding force. Indeed, in 1964 the Court held in *Malloy v. Hogan* that the self-incrimination provision of the fifth amendment was made applicable to the states by the fourteenth amendment due process clause.[17] Immediately after *Malloy*, the Court chose, in *Escobedo v. Illinois*, to step back from the self-incrimination approach,[18] looking instead to the sixth amendment right to counsel as a precursor to *Miranda*.

Danny Escobedo was arrested and taken to police headquarters for questioning. For a long period of time Escobedo's lawyer was present at the police station demanding to see his client. Escobedo, knowing that the lawyer was present, asked to see his attorney. All requests were refused, and Escobedo ultimately confessed. The question for the Court was whether the confession should be admissible.

Surprisingly, the Court's decision in *Escobedo v. Illinois*[19] did not focus on the fifth amendment provision incorporated in *Malloy v. Hogan*. Instead, the Court looked to the sixth amendment right to counsel and discussed how it would be "highly incongruous" if the confession could be extracted from the accused "while his own lawyer, seeking to speak with him, was kept from him by the police." For much of the opinion, Justice Goldberg spoke broadly of the constitutional considerations involved in the case:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said: "*[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a

17. 378 U.S. 1 (1964).
18. 378 U.S. 478 (1964). *Escobedo* was decided one week after *Malloy v. Hogan*.
19. *Id.*

> confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized."[20]

Ultimately, however, the language of the *Escobedo* Court was either extremely limiting in its holding, or downright confusing.

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment," . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.
>
> We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.[21]

The juxtaposition of this narrow holding with the broad dicta created great confusion immediately after the *Escobedo* decision. Some courts interpreted *Escobedo* to hold that a constitutional violation occurred only if the suspect specifically requested counsel.[22] Other judges took a broader view and found that interrogation could not occur unless the defendant had been effectively informed of his right to a lawyer as well as his right to remain silent.[23] Within a two-year period, with confusion and inconsistencies mounting, the Supreme Court decided to review its holding in *Escobedo*.

Miranda v. Arizona

Four cases were joined together for decision in *Miranda v. Arizona*.[24] While the facts in each differed somewhat, the cases shared two common and vital points. In each "the defendants' statements [might not] have been involun-

20. *Id.* at 489 (emphasis by the Court).
21. *Id.* at 490-91, 492.
22. *See, e.g.*, Hawaii v. Cummings, 49 Hawaii 522, 423 P.2d 438 (1967).
23. *See, e.g.*, State v. Neely, 239 Or. 487, 398 P.2d 482 (1965).
24. Westover v. United States, 342 F.2d 684 (9th Cir. 1965); Miranda v. Arizona, 98 Ariz.

tary in traditional terms,"[25] and in each the defendant was not warned of the right to remain silent. While beginning the opinion with reference to the sixth amendment right to counsel,[26] the Court soon made clear that the linchpin in this area was the fifth amendment principle that "no person . . . shall be compelled in any criminal case to be a witness against himself."[27]

Chief Justice Warren, for a five-Justice majority,[28] discussed in detail common techniques for interrogation that were designed to obtain an admission of guilt.[29] Putting those techniques together with the unfriendly atmosphere normally surrounding the interrogation of a suspect,[30] the majority concluded that specific procedures would be required so as to apprise "accused persons of their right of silence and . . . a continuous opportunity to exercise it."[31] The Court first indicated that the rules applied only to individuals who were in custody and subject to interrogation. In such cases, those individuals would need to be informed in clear and unequivocable terms that they had the right to remain silent, that anything said could and would be used against the individual in court, that the defendant had a right to have an attorney present during interrogation, and that the state would provide indigent defendants with attorneys if they so wished.[32]

The opinion in *Miranda* produced a firestorm of protest. Justice Harlan, dissenting, stated that he refused to subscribe "to the generally black picture of police conduct painted by the Court,"[33] and instead he urged the Court to retain the system of voluntariness, which had been the exclusive remedy up until that time. Apart from his theoretical criticism of the Chief Justice's opinion, he was quite concerned that "the Court's new code would markedly decrease the number of confessions."[34]

Despite the criticism, the Court moved forward. In a series of cases decided soon after *Miranda*, the Justices continued to reaffirm the holding there and indeed expanded it. An analysis of this expansion can best be explored by a comparison of the approach of the Warren Court to that of the Burger Court.

Two Very Different Courts Take Two Different Views of Miranda

Warnings

Chief Justice Warren in the *Miranda* case was very specific as to the law

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18, 401 P.2d 721 (1965); California v. Stewart, 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. Rptr. 201 (1965); Vignera v. New York, 15 N.Y.2d 970, 207 N.E.2d 527, 259 N.Y.S.2d 857 (1965).

25. 384 U.S. 436, 457 (1966).

26. *Id.* at 442.

27. One of the "basic rights . . . enshrined in our Constitution." *Id.*

28. Justices Black, Douglas, Brennan, and Marshall joined in the majority opinion.

29. He looked to "various police manuals and texts," a "valuable source of information about present police practices." *Id.* at 448.

30. These are such techniques as interrogators offering seemingly legal excuses for the crime, portraying a two-person "friendly-unfriendly" act ("Mutt and Jeff" routine). *Id.* at 451-52.

31. *Id.* at 444.

32. *Id.* at 479.

33. *Id.* at 515 (Harlan, J., dissenting).

34. *Id.* at 516.

enforcement obligations in giving warnings. He spelled out in detail the precise message to be given to the suspect in custody.

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.[35]

In referring to these "safeguards," he pointed out that no other procedure would be acceptable unless the Court was shown that such other methods were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."[36]

While numerous state and lower court decisions pondered the precise wording of the warnings after *Miranda*, no case directly raised the issue in the Supreme Court until *California v. Prysock*.[37] The defendant there, a juvenile, was advised by law enforcement officers that he had "the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning," and further informed him that he had "the right to have a lawyer appointed to represent you at no cost to yourself."[38] The California Court of Appeals ruled that the confession could not be admissible because he had not been "explicitly informed of his right to have an attorney appointed before further questioning."[39] The United States Supreme Court disagreed. It held that no rigid adherence to the precise words of *Miranda* was needed so long as the defendant essentially received the warnings concerning silence and counsel.[40] Holding that the officer's actions in *Prysock* had done just that, the Court refused to find a constitutional violation.[41]

35. *Id.* at 471-72.
36. *Id.* at 467.
37. 453 U.S. 355 (1981).
38. *Id.* at 357.
39. *Id.* at 358-59.
40. *Id.*

> This Court has never indicated that the "rigidity" of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. This Court and others *have* stressed as one virtue of *Miranda* the fact that the giving of the warning obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused. Nothing in these observations suggests any desirable rigidity in the form of the required warnings. *Id.*

41. Justice Stevens, in dissent, found the warnings to be ambiguous. He emphasized the requirement "that an accused be adequately informed of his right to have counsel appointed prior to any police questioning." *Id.* at 363 (Stevens, J., dissenting).

Custody

Soon after the Warren Court's decision in *Miranda*, it was forced to consider several cases involving the question of custody. For example, in *Mathis v. United States*,[42] the defendant had been placed in jail for an entirely separate offense. Police officers questioned him about an unrelated tax investigation. The Court nonetheless found that *Miranda* still applied, for the defendant had been "deprived of his freedom by the authorities in [a] significant way."[43] Similarly, in *Orozco v. Texas*,[44] decided just one year later, the Court concluded that custody could be found even when the defendant had been arrested in his own residence. The police there were admitted to the defendant's bedroom at a boardinghouse. Because the defendant was not free to go at that time, the majority found that he was in custody even though he was not in the "isolated setting of the police station."[45]

The Burger Court has taken a far more restrictive view of custody. In several key cases the Court has narrowly construed the *Miranda* holding with respect to the significant deprivation of freedom. Two in particular are noteworthy.[46] The first is *Oregon v. Mathiason*,[47] where the defendant, on parole at the time of his interrogation, was suspected by police officers of committing a theft. An officer asked the defendant to come to the station house and while there the defendant confessed in response to interrogation. The Supreme Court of Oregon found that *Miranda* required suppression of the statement because no warnings had been given.

> We hold the interrogation took place in a "coercive environment." The parties were in the offices of the State Police; they were alone behind closed doors; the officer informed the defendant he was a suspect in a theft and the authorities had evidence incriminating him in the crime; and the defendant was a parolee under supervision. We are of the opinion that this evidence is not overcome by the evidence that the defendant came to the office in response to a request and was told he was not under arrest.[48]

The majority of the Court, in a per curiam decision, found that while *Mathis* and *Orozco* were still good law, there was no indication "that the questioning took place in a context where respondent's freedom to depart was restricted

42. 391 U.S. 1 (1968).

43. *Id.* at 5.

44. 394 U.S. 324 (1969).

45. *Id.* at 326. The dissenters (Justices White and Stewart) did not believe that *Miranda* applied in the familiar surroundings involved in *Orozco*. "The Court wholly ignores the question whether similar hazards exist or even are possible when police arrest and interrogate on the spot, whether it be on the street corner or in the home, as in this case." *Id.* at 329 (White, J., dissenting).

46. There are others. *See, e.g.*, Beckwith v. United States, 425 U.S. 341 (1976), where the Court refused to apply *Miranda* to an IRS investigation conducted at a private home.

47. 429 U.S. 492 (1977).

48. *Id.* at 494 (*quoting* Oregon v. Mathiason, 275 Or. 1, 5, 549 P.2d 673, 675 (1976)).

in any way."[49] Thus, the majority focused not on the hostile environment of the setting (stressed repeatedly by the Chief Justice in *Miranda*[50]) but instead on the defendant's ability to come or go as he pleased. With such emphasis, the Court was able to define custody narrowly so as to exclude the facts in the instant case.[51]

An even more significant decision was reached more recently in *Berkermer v. McCarty*.[52] There the defendant was stopped for a routine traffic violation. The defendant argued that he was in custody when he was pulled to the side of the road by the police officers, as his freedom of movement had been significantly limited by such law enforcement conduct. The Court, in an opinion by Justice Marshall, disagreed, focusing on the routine nature of a traffic stop.

> Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced "to speak where he would not otherwise do so freely." First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions . . . but that in the end he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite different from station-house interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.
>
> Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police.[53]

While the decision in *Berkermer v. McCarty* makes a good deal of sense, relating as it does to the most commonplace, routine sorts of traffic stops, *Mathiason* is not nearly so easily justified. There the defendant, a parolee, was brought to the hostile environment of a station house and was intensively interrogated before he confessed. It is true that he was not "formally under arrest"; it is nevertheless also true that the pressures brought to bear by the Oregon police were not significantly different from the pressures brought to bear by the Arizona police in *Miranda v. Arizona*. Hence, the inescapable

49. 429 U.S. at 495.

50. And by Justice Marshall, dissenting in *Mathiason*: "[I]f respondent entertained objectively reasonable belief that he was not free to leave during questioning, then he was 'deprived of his freedom of action in a significant way'." *Id.* at 496.

51. See *supra* text accompanying note 49.

52. 104 S. Ct. 3138 (1984).

53. *Id.* at 3149-50.

conclusion is reached that the Court in *Mathiason* was trying to limit the holding of *Miranda* with respect to the concept of custody.[54]

Interrogation

Chief Justice Warren spent little time in *Miranda* discussing the meaning of the term "interrogation." In most cases it is clear that the suspect has been interrogated. The only material language on point in *Miranda* was succinct. "By custodial interrogation, we mean questioning *initiated* by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[55] The Burger Court, however, has spoken extensively on the concept of interrogation and in two cases reached what appear to be quite different results on the meaning of interrogation. The first is *Brewer v. Williams*.[56] The defendant in that case was being transported from one city in Iowa to another after an agreement had been reached (between the lawyer and the police) that he would not be interrogated by the escorting police officers.[57] During the course of travel, on a wintry day in the countryside, one of the police officers, addressing the defendant as "reverend," made the "now famous 'Christian burial speech'."[58] This speech became the focal point of the Court's opinion in the case.

> "I want to give you something to think about while we're traveling down the road. . . .Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all."[59]

Justice Stewart, for a majority of the Court, found that this speech was indeed interrogation for the officer "purposely sought during Williams' isola-

54. *Mathiason* was recently reaffirmed in California v. Beheler, 463 U.S. 1121 (1983).

55. 384 U.S. at 444.

56. 430 U.S. 387 (1977). Ultimately, the case was resolved on sixth amendment waiver grounds. The question of interrogation under both amendments is identical, however. *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980), involving jailhouse interrogation after indictment.

57. 430 U.S. at 391-92.

58. As referred to by the lawyers and the Court. *Id.* at 392.

59. *Id.* at 392-93.

tion from his lawyers to obtain as much incriminating information as possible."[60] Several members of the Court dissented from the holding, finding that there was no interrogation.[61] In particular, however, Chief Justice Burger strongly disputed the Court's conclusion. He noted that the defendant had been "prompted by the detective's statement—not interrogation but a statement."[62] Just three years later the Chief Justice's narrow view of the concept of interrogation was to prevail in *Rhode Island v. Innis*.[63]

Justice Stewart also wrote the opinion in *Innis*. There, however, the facts were somewhat different, for the statement of one officer was directed to another officer, rather than to the defendant. Innis had been picked up late one evening in connection with a murder charge. While en route to the station house one of the officers initiated a conversation with another officer concerning a missing shotgun. Innis was in the back seat of the squad car at this time and heard the entire conversation. The essence of the conversation was that one officer thought it would be tragic if a child at the nearby school for handicapped children were to find the shotgun that had been used and hidden by the suspect. In apparent response to this statement, the defendant interrupted the conversation and showed the officers where the gun had been located. Justice Stewart conceded that interrogation, as defined in *Miranda*, was not to apply only "to those police interrogation practices that involve express questioning of a defendant while in custody."[64] Rather, other techniques of persuasion, wholly apart from express questioning, could amount to interrogation.[65] The issue was whether the "words or actions on the part of the police (other than those normally attendant to arrest and custody) [were such] that the police should know [they] are reasonably likely to elicit an incriminating response from the suspect."[66] Finding that the statements of the officers were not reasonably designed to elicit a response, the majority decided that there was no interrogation.

It is difficult to understand the holdings as applied to the facts in the cases. The standards used in both cases seem similar. Were the actions of the officers truly, and reasonably, designed to receive incriminating information from the suspect? In *Brewer v. Williams*, the entire point of the "Christian burial speech" was clearly to prompt the suspect to incriminate himself. In *Innis*

60. *Id.* at 399.

61. Justice Blackmun noted that "[p]ersons in custody frequently volunteer statements in response to stimuli other than interrogation." *Id.* at 440 (Blackman, J., dissenting).

62. For him, the "result in this case ought to be intolerable in any society which purports to call itself an organized society." *Id.* at 415 (Burger, J., dissenting). Williams was retried and convicted and his conviction was ultimately affirmed. *See* Nix v. Williams, 104 S. Ct. 2501 (1984).

63. 446 U.S. 291 (1980).

64. *Id.* at 298.

65. *Id.* at 299. "The concern of the Court in *Miranda* was that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Id.*

66. *Id.* at 301.

it is a closer question. Still, it is hard to justify the Court's conclusion. As Justice Marshall noted in dissent, the purpose of the conversation between the officers appeared to be to retrieve the shotgun and hence to record incriminating statements by the suspect.[67]

> One can scarcely imagine a stronger appeal to the conscience of a suspect—any suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed. And not just any innocent person, but an innocent child—a little girl—a helpless, handicapped little girl on her way to school. The notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous. As a matter of fact, the appeal to a suspect to confess for the sake of others, to "display some evidence of decency and honor," is a classic interrogation technique.[68]

Justice Marshall's conclusion is correct. Why engage in this conversation? Moreover, the conversation "must have begun almost immediately" after the arrest because the car traveled no more than a mile before Innis agreed to point out the location of the murder weapon. The test in both cases appears to be a faithful construction of *Miranda* focusing on the technique used as opposed to the presence of express questioning. In *Brewer v. Williams* the test is applied correctly; in *Innis* it is not.

Resumption of Questioning

The defendant is taken into custody, given the appropriate warnings and then asked questions by police officers. He then says that he does not wish to talk, either because he simply wants to remain silent, or because he wants to confer with a lawyer. Can the officers ask him additional questions after he has first declined to talk with them?

The lower courts had considerable difficulty with the question of the officers resuming the interrogation and split along various lines.[69] It was not until 1975 that the United States Supreme Court chose to grapple with the issue directly. In *Michigan v. Mosely* the defendant was arrested in connection with several robberies.[70] The arresting officer advised Mosely of his *Miranda* rights and then began questioning him. At that point Mosely said he did not want to answer any questions about the robbery; the interrogation ceased. Some hours later a police detective questioned Mosely about a murder, a crime for which Mosely had not been arrested nor interrogated. Once again Mosely

67. *Id.* at 306-07 (Marshall, J., dissenting).

68. *Id.* at 306.

69. *See, e.g.*, White v. Finkbeiner, 611 F.2d 186 (7th Cir. 1979) (no per se rule even with demand for a lawyer); United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976) (demand for a lawyer); People v. Stander, 73 Mich. App. 617, 251 N.W.2d 258 (1977) (reinterrogation on the *same* offense).

70. 423 U.S. 96 (1975).

received his *Miranda* warnings. In response to this second round of questioning, Mosely made incriminating statements. The question, therefore, was whether *Miranda* prohibited the second attempt at interrogation?

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.[71]

Justice Brennan, in dissent, thought that the "second round" was improper. He argued that the police officers had not "scrupulously honored" the defendant's exercise of his "right to cut off questioning."[72] The majority, however, disagreed. Justice Stewart found that Mosely had a right to cut off questioning and did so. It was only after a break in time,[73] the provision of a fresh set of warnings, and interrogation on an unrelated offense that Mosely freely confessed.

In many ways the decision in *Mosely* is strikingly reminiscent of the holding in *Escobedo*. While the language here was also broad, the ultimate holding was quite narrow. This was a situation in which there was no repeated immediate questioning; it was not about the same crime; and the defendant had received a fresh set of warnings before the second interrogation. Even more important, however, Mosely *had* merely chosen to remain silent; he had not asked for counsel.

The defendant in *Edwards v. Arizona* did ask for a lawyer after he was arrested.[74] He specifically stated, "I want an attorney before making a deal." At that point questioning ceased and he was taken to jail. The next morning the officers gave him his *Miranda* warnings again and informed him that he "had" to talk with them. He thereafter made an incriminating statement. The Court in *Edwards* went back to the language of *Miranda* and had little difficulty in concluding that the statement by the defendant had to be suppressed. The Court noted that the Chief Justice's opinion in *Miranda* distinguished between the two requests made by the suspect. "If the accused indicates that he wishes to remain silent 'the interrogation must cease'. . . . If he requests counsel, 'the interrogation must cease until an attorney is present'."[75]

71. *Id.* at 100-01 (*quoting* Miranda v. Arizona, 384 U.S. 436, 473-74).

72. *Id.* at 115 (Brennan, J., dissenting).

73. Justice White argued in his concurrence that the time factor was simply one consideration in determining if the defendant's statement was voluntary. *Id.* at 110-11.

74. 451 U.S. 477 (1981).

75. *Id.* at 482 (*quoting* Miranda v. Arizona, 384 U.S. 436, 474).

No doubt the decision in *Edwards* is correct. The officers ought not to be able to reinterrogate on the same offense or an unrelated offense when the defendant has made clear that he wishes to remain silent until his attorney is present. What is surprising about the two cases is the ease with which the Court in *Edwards* distinguishes the two fact patterns. That is, it is not clear why the statement is not suppressed in both cases. If the defendant has indicated he wishes to remain silent, *Miranda* states that "the interrogation must cease." It must cease, presumably, because the fifth amendment privilege against self-incrimination requires that the police scrupulously honor the defendant's exercise of that right. Whether the reinterrogation of the defendant hours later is scrupulously honoring his right is open to severe question.

Waiver

The waiver problem in the *Miranda* context arises with great regularity. The defendant is given the *Miranda* warnings, acknowledges that he receives them, and then he makes an incriminating statement. The question is whether that incriminating statement was made after a knowing and voluntary relinquishment of rights. The Warren Court had little occasion to consider the question in connection with the statements made by the defendant. Once again anticipating a problem, the Court noted that if the defendant speaks without consulting an attorney, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[76]

The Burger Court, on the other hand, has had many occasions to deal with the concept of waiver in this context. One of its strongest statements is found in *Tague v. Louisiana*.[77] The testifying officer there indicated that he had read the defendant his rights and that he was not sure what the petitioner's response was to those rights, other than to make an incriminating statement. The Louisiana Supreme Court held that it could "be presumed that a person has capacity to understand, and the burden is on the one claiming a lack of capacity to show that lack."[78] The United States Supreme Court had little difficulty reversing that decision, finding, in a summary proceeding, that the proof obligation is on the government rather than the defendant: "The courts must presume that a defendant did not waive his rights; the prosecution's burden is great."[79]

North Carolina v. Butler raised the question of whether a statement under *Miranda* would be admissible unless the defendant "explicitly waived the right to the presence of a lawyer."[80] The North Carolina Supreme Court had held that an express statement would be required to constitute a waiver. Justice Stewart concluded that an express statement could be sufficient to constitute

76. 384 U.S. at 475.
77. 444 U.S. 469 (1980).
78. *Id.* at 470 (*quoting* State v. Tague, 372 So. 2d 555, 557-58).
79. *Id.* at 471.
80. 441 U.S. 369 (1979).

a waiver, but it was not necessary. Once again the Court looked back to the language of *Miranda*, which did not appear to require any explicit action of the defendant.

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.[81]

While an express waiver requirement would certainly be helpful to lawyers in this area,[82] the real question is the state of mind of the defendant. Thus, under traditional waiver law, the question must be determined on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[83]

The most troubling decision by the Burger Court in applying the waiver rules under *Miranda* arose in a nontraditional waiver setting. The defendant in *Oregon v. Elstad*[84] confessed in response to custodial interrogation without having received *Miranda* warnings. Thereafter, he was given the warnings and he gave a second, more detailed confession. The first confession was clearly inadmissible under *Miranda*. The issue, thus, was whether the second confession was also inadmissible. Utilizing a "fruit of the poisonous tree" analysis, a number of judges and commentators had concluded that the second confession was "tainted" by the first confession.[85] That is, because the defendant

81. *Id.* at 373.

82. Indeed, Justice Brennan in dissent argued that the facts in *Butler* present "a clear example of the need for an express waiver requirement." *Id.* at 378 (Brennan, J., dissenting).

83. *Id.* at 374-75, *quoting* Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The Court also considered the waiver question in Fare v. Michael C., 442 U.S. 707 (1979). There the juvenile on probation asked to see his probation officer. He did not state that he wished to remain silent or wanted to see his attorney. California courts held that his request constituted an invocation of the minor's fifth amendment rights. The Supreme Court once again looked to a case-by-case determination of knowing and voluntary waiver and found that the request for the probation officer was not, per se, an invocation of rights. The majority decided that the defendant was of adequate intelligence to understand the rights he was waiving and the consequences of that waiver when he spoke.

84. 105 S. Ct. 1285 (1985).

85. The seminal "fruit of the poisonous tree" decision is Wong Sun v. United States, 371 U.S. 471 (1963). The Court there concluded that if there was an initial governmental illegality,

was in custody at the time both statements were made, and because he was not advised that the first confession would be inadmissible, it was that first illegality (questioning without *Miranda* warnings) which directly led to the second confession.

Justice O'Connor refused to apply the "fruit of the poisonous tree" analysis to the problem. She instead focused on the question of waiver.

> The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative.[86]

It is hard to justify the result in *Elstad* for at least two reasons. If one of the bases for the *Miranda* decision was to encourage proper and effective law enforcement, admitting the statement in *Elstad* tends to defeat that purpose. That is, this was not a case in which the officers were unaware of the holding in *Miranda* before interrogating the suspect. Indeed, almost immediately after receiving the first confession without warnings, the officers gave the *Miranda* warnings. Thus, admitting the statement can only encourage what appears to be, at minimum, sloppy police interrogation. The second reason relates to the concept of "fruit of the poisonous tree." The rationale for this doctrine is that police officers ought not to benefit from illegality either in connection with evidence immediately obtained (the first confession) or evidence thereafter obtained (the second confession). While certainly not *all* subsequent evidence should be excluded, the Court has been careful to make narrow exceptions to this doctrine. Thus, if the evidence would inevitably have been discovered,[87] or if the illegality led to a third party who voluntarily made a statement,[88] such evidence is admitted. In the instant case, however, the officers knowingly violated the defendant's rights. While the defendant was still in custody they interrogated him. It is difficult to understand why this second confession is not, truly, the fruit of the poisonous tree.

Impeachment

Courts have been plagued for many years with questions concerning evidence offered for the limited purpose of attacking the credibility of a witness, as opposed to being used by the trier of fact to find civil liability or criminal guilt. For example, in some jurisdictions prior inconsistent statements, even

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later evidence found as a result of that act should normally not be admissible at trial. The question is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488.

86. 105 S. Ct. at 1298.

87. Nix v. Williams, 104 S. Ct. 2501 (1984).

88. United States v. Ceccolini, 435 U.S. 268 (1978).

those made under oath, can only be used to attack the current statement by the witness at trial, as opposed to being utilized as proof on the particular point.[89] Also, evidence that ran afoul of the fourth amendment could be used in limited situations to discredit the statement of a witness at trial even though they could not be offered to prove guilt because of the manner in which the evidence had been obtained.[90]

It was not until *Harris v. New York*[91] that the impeachment question arose in the context of a statement received in violation of *Miranda* being used to impeach the in-court statement of the defendant. Once again, the Warren Court did not have occasion to deal specifically with such a case, though it appeared that its members had anticipated the problem by making reference to it in the *Miranda* decision.

> The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner. . . . [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial. . . .These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.[92]

In *Harris* the defendant was convicted of selling heroin to an undercover police officer. At trial he took the stand in his own defense, acknowledging making the sale but claiming that the substance was baking powder and part of a scheme to defraud. On cross-examination the government's lawyer asked the defendant whether he had made specific statements to the police following his arrest that contradicted the testimony at trial. The trial judge instructed the jury that the earlier statements referred to could only be considered in passing on the witness' current credibility, but could not be used by the jury as evidence of guilt in connection with the charged crime.[93] The government conceded that the statements could not be used in the case in chief because they were inadmissible under *Miranda*, but argued that the statements could be used to impeach.

Chief Justice Burger stressed that the defendant ought not to be able to take the stand and lie with impunity. "Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process."[94] The Chief Justice went on to point out that while the evidence excluded under *Miranda* could not be used in the case

89. The rules as to the force to be given to prior inconsistent statements differ greatly. *See* 4 J. WEINSTEIN, WEINSTEIN'S EVIDENCE 801-82 to 801-134 (1985) for a discussion of Federal Rule of Evidence 801(d)(1).

90. Walder v. United States, 347 U.S. 62 (1954).

91. 401 U.S. 222 (1971).

92. *Miranda*, 384 U.S. at 476-77.

93. *Harris*, 401 U.S. at 223.

94. *Id.* at 225.

to prove the guilt or innocence of the defendant, it would be wrong to exclude the evidence entirely when the defendant has taken the stand. "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements."[95]

As in *Elstad*, the Burger Court either misconstrued the rationale for *Miranda* or purposely chose to limit the holding. That is, the Court in *Harris* focused exclusively on the defendant's taking the stand and lying. It ignored one of the chief bases of *Miranda*, which was to encourage proper and effective law enforcement. If law enforcement officials believe that there is a chance that a confession can be admitted for at least some purposes, even if they have chosen not to adhere to the rules of *Miranda*, they will certainly not be discouraged entirely from improper behavior.[96] Moreover, as has been pointed out on innumerable occasions, there are serious questions as to whether the jury can indeed understand the distinction between using evidence purely to discredit the current testimony and using it to prove the guilt or innocence of the defendant.[97]

Application of the Fifth Amendment

In the years after *Miranda* was decided, the dissenting Justices complained bitterly about the application of *Miranda* and expressed great fears as to its impact on effective law enforcement.[98] When Warren Burger assumed the position of Chief Justice, he and the other new appointments to the Court generally subscribed to this harsh criticism.[99] In recent years, however, the criticism has abated considerably and indeed the Court has chosen to expand the holding of *Miranda* in a few significant areas.

The first area of expansion was one that was left open in *Miranda* or that

95. *Id.* at 226.

96. This was the position taken by dissenting Justices Brennan, Douglas and Marshall:

> Thus, even to the extent that *Miranda* was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution.

Id. at 232 (Brennan, J., dissenting).

97. In the words of Learned Hand, such an exercise is "a mental gymnastic which is beyond, not only [the jury's] power, but anybody else's." *See* the discussion in People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

98. *See generally* the dissents in *Orozco*, 394 U.S. 324 (1969), *Mathis*, 391 U.S. 1 (1968), and Doyle v. Ohio, 426 U.S. 610 (1976).

99. Beginning in 1971, only five new Justices have joined the Court: Harry Blackmun (appointed in 1970, former judge of the Eighth Circuit); Lewis Powell (1972, president of the ABA, private practitioner from Virginia); Sandra Day O'Connor (1981, Arizona appeals judge); William Rehnquist (1972, Assistant Attorney General); and John Paul Stevens (1975, Seventh Circuit).

at least was not specifically addressed. The question was whether *Miranda* applied to *all* criminal cases, or only to serious ones. Some lower federal courts assumed that the Court in *Miranda* did not mean to apply the fifth amendment rule to even the most minor infractions and narrowly construed the holding. The United States Supreme Court, however, concluded that the chief point in *Miranda* was that the fifth amendment applies whenever the defendant is in custody and is being interrogated, for whatever the crime. Hence, even if the defendant was in custody for a relatively minor offense, *Miranda* would apply.[100]

Further expansion of *Miranda* also occurred in a case in which Chief Justice Burger delivered the opinion of the Court. In *Estelle v. Smith* the Court determined that the government could not use psychiatric testimony as to the defendant's statements at the sentencing phase of the defendant's capital murder trial to establish his future dangerousness.[101] The government had argued that *Miranda* ought to be limited to traditional interrogation by law enforcement officials. The Chief Justice disagreed, being unwilling to distinguish between the guilt and the penalty phases of a capital murder trial and between the interrogation given by police officers and the conversations of the defendant with the psychiatrist.

> Dr. Grigson's prognosis as to future dangerousness rested on statements respondent made, and remarks he omitted, reciting the details of the crime. The Fifth Amendment privilege, therefore, is directly involved here because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination.[102]

The major recent limitation on the rule in *Miranda* occurred in the case that has become generally referred to as the "public safety exception" case, *New York v. Quarles*.[103] The defendant was convicted of rape. He had been cornered in a supermarket by police and was immediately asked where his gun was. The suspect gave an incriminating answer to the question. No *Miranda* warnings were given. Under a literal analysis of *Miranda*, the statement could not be admissible because the defendant had been interrogated and was clearly in custody during that interrogation. Justice Rehnquist, for a majority of the Court, however, found that *Miranda* could not apply to the situation in which the interrogation was not aimed at receiving a statement, but rather at protecting the public. "In the case at bar there was fear that the gun could be located by a child during the course of investigation."

> We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege

100. Berkemer v. McCarty, 464 U.S. 1038 (1984).
101. 451 U.S. at 454 (1981).
102. *Id.* at 464-65.
103. 104 S. Ct. 2626 (1984).

> against self-incrimination. We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.[104]

While police officers ought to be able to ask a suspect where his weapon is so that a public safety problem does not arise, the conclusion that the defendant's response ought to be admissible is unsound. *Miranda* was aimed at interrogation that could force a defendant to involuntarily give up fifth amendment rights concerning self-incrimination. Clearly, being cornered in a store by armed and uniformed police officers creates a very real risk that without warnings the defendant cannot voluntarily relinquish his rights. Once again, that does not mean the police officers cannot ask the question, receive the answer, and locate the weapon. It simply means that the defendant's own statement could not be used to convict.[105]

Conclusion

The United States Supreme Court's ruling in *Miranda v. Arizona* was truly a landmark decision. For the first time the Court articulated with clarity the principles behind the fifth amendment privilege against self-incrimination and the procedures that would need to be followed by law enforcement officials in interrogating suspects. In the years immediately following *Miranda* the Court expanded its holding to include areas perhaps not fully anticipated in its original decision. With virtually a complete turnover in personnel on the Supreme Court, however, there was great fear that *Miranda* would be overruled or so severely limited that it would have little effective place in modern law enforcement.

The fears of drastic change were ill-founded. The Burger Court has certainly narrowed the holding of *Miranda* in some important areas, such as the resumption of questioning, the impeachment of the defendant, the use of statements in connection with public safety problems, and the application of the "fruit of the poisonous tree" doctrine. Nevertheless, it has not overruled *Miranda* and has, indeed, expanded it in several important areas, such

104. *Id.* at 2633.

105. The policies underlying the Fifth Amendment's privilege against self-incrimination are not diminished simply because testimony is compelled to protect the public's safety. The majority should not be permitted to elude the Amendment's absolute prohibition simply by calculating special costs that arise when the public's safety is at issue. Indeed, were constitutional adjudication always conducted in such an *ad hoc* manner, the Bill of Rights would be a most unreliable protector of individual liberties

104 S. Ct. at 2649 (Marshall, J., dissenting).

as the resumption of questioning involving the request for counsel, the application of *Miranda* to nontraditional criminal interrogations, and the use of *Miranda* in all criminal cases. Indeed, Chief Justice Burger, himself a vehement critic of *Miranda*, has concluded that the decision should not be changed. "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date."[106]

Miranda was a landmark decision when decided. In today's world it has been a powerful influence that has helped to professionalize law enforcement agencies. The Burger Court has made some inroads in limiting the holding and application of *Miranda*. In some areas, though, the opinion has been strengthened and even broadened. *Miranda* remains a vital and important ruling today.

106. Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (concurring opinion).